

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

No. CR 01-0344

v.

DOUGLAS STEPNEY, et al.,

Defendants.

**ORDER RE MOTION TO DISMISS
CHARGES ARISING FROM
UNCONSTITUTIONAL STATUTES**

Defendants in this action are charged with violating multiple federal conspiracy, drug and weapons provisions. Seizing upon a footnote in the Brief for the United States in Opposition to a Petition for Writ of Certiorari in United States v. Emerson, No. 01-8780 at 18 n.3, defendants have filed a thirty-eight page motion to dismiss. Defendants attack on Second Amendment grounds counts of the indictment in this action charging them with violations of 18 U.S.C. sections 922(g)(1), 922(o) and various provisions of section 924 related to the use, possession or transfer of firearms. They also make several constitutional arguments regarding the machine gun allegations.

Defendants' motion has no merit. Even if the statement contained in footnote 3 were a correct statement of Second Amendment law, defendants conveniently ignore the body of the Brief in which the Solicitor General acknowledges that "[p]etitioner identifies no case, and the government is aware of none, in which a court of appeals has found Section 922(g)(8) – or, for that

1 matter, any other federal statutory restriction on private gun possession to be violative of the Second
2 Amendment.” Brief at 18. The Solicitor General then went on to urge that petitioner’s claim of
3 unconstitutionality did not warrant further review and took the position that certiorari should not be
4 granted to review the Court of Appeals’ reversal of the district court’s dismissal of the indictment on
5 various constitutional grounds. In a companion case, United States v. Haney, No. 01-8272, the
6 United States filed a Brief in Opposition to the Petition for Writ of Certiorari, arguing that there was
7 no authority for granting certiorari to review the conviction of a defendant for a violation of section
8 922(o).¹ Even under the Fifth Circuit’s interpretation of the Second Amendment in United States v.
9 Emerson, 270 F.3d 203 (5th Cir. 2001), the Solicitor General stated that it would be unlikely that a
10 “prohibition on possession of a machinegun [would be found] unreasonable.” Ultimately, the
11 Supreme Court denied certiorari. See United States v. Emerson, ___ U.S. ___, 122 S. Ct. 2362 (2002)
12 and United States v. Haney, ___ U.S. ___, 122 S. Ct. 2362 (2002).

13 Nonetheless, defendants’ counsel proceeds to argue for the inviolate right of ex-felons to
14 possess machine guns and other firearms.

15 Defendants’ motion not only ignores the context of the Solicitor General’s argument and the
16 Supreme Court’s denial of certiorari in these cases, but also flies directly in the face of binding Ninth
17 Circuit law. See Hickman v. Block, 81 F.3d 98, 101 (9th Cir. 1996), cert. denied, 519 U.S. 912
18 (1996). Furthermore, courts have repeatedly upheld convictions for violations of section 922(o), as
19 they did in Haney, finding no difficulty with the definition of machine gun which is spelled out in
20 detail in 26 U.S.C. section 2845. See, e.g., Staples v. United States, 511 U.S. 600 (1994).

21 Each of defendants’ arguments is specious and involves a tortured interpretation of existing
22 case law as well as the government’s so-called “sea-change” in position. Well-established rules of
23 ethical conduct require *all* attorneys to exercise their informed professional judgment to refrain from
24 wasting the court’s time and prejudicing their clients’ interests. See, e.g., ABA Standards for
25 Criminal Justice, Commentary to 4-1.2 (3d ed. 1993); ABA Model Rules of Professional Conduct
26 Rule 3.1 & Commentary (1999) (“A lawyer has a *professional obligation* to the client, the court, and
27 the adversaries to ensure that actions commenced and positions advanced are not frivolous or
28

meritless.”) (emphasis added). Indeed, the Supreme Court has reiterated that “[a] lawyer, after all, has no duty, indeed no right, to pester a court with frivolous arguments....” McCoy v. Court of Appeals of Wisconsin, 486 U.S. 429, 436 (1988).

The motion filed in this action is one of those clever pieces of mental gymnastics engaged in late in the evening, perhaps after a night cap. In the reasoned and sober light of day, responsible attorneys routinely follow the requirements of the ABA Standards and of the courts, exercise their *informed professional judgment* and shelve such motions. The cost of defendants’ failure to do so in this case is undoubtedly substantial. The Public Defender wasted time and energy on this thirty-eight page, wholly academic exercise using the public funds that support that office. Most significant, however, is the disadvantage suffered by other defendants who rely on the finite resources of publicly funded attorneys and the finite resources of the court. The court will not reimburse attorneys out of CJA funds for such useless time. The court reminds defense counsel that they owe a duty to serve their clients’ best interests rather than engage in meritless and self-serving intellectual forays under the umbrella of zealous advocacy.

The court will not indulge this effort any further by requiring the government to file a response or by dignifying it with a full-blown opinion.

Defendants’ motion to dismiss is DENIED.

IT IS SO ORDERED

Dated:

MARILYN HALL PATEL
Chief Judge
United States District Court
Northern District of California

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ENDNOTES

1. The Tenth Circuit had affirmed the conviction for violations of 18 U.S.C. section 922(o), possession of machine guns, rejecting defendant's Second Amendment arguments. United States v. Haney, 264 F.3d 1161 (10th Cir. 2001).

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